IN THE SUPREME COURT OF MISSOURI

Appeal No. SC85773

KEVIN S. BROWN and MELODY L. BROWN,

Respondents,

vs.

FIRST HORIZON HOME LOAN CORPORATION,

Appellant.

Appeal from the Associate Circuit Court of the County of Stoddard
State of Missouri

Honorable Joe Z. Satterfield

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

This is an appeal from a Summary Judgment entered by the Associate Circuit Court of the County of Stoddard in favor of Respondents, Kevin S. Brown and Melody L. Brown, and against Appellant, First Horizon Home Loan Corporation.

The appeal involves an issue concerning whether Mo. Rev. Stat. § 443.130 (2000), as applied to the facts of this case, is unconstitutionally vague and contravenes the due process clause of Amendment XIV of the United States Constitution and Article I, Section 10 of the Constitution of Missouri where a borrower/mortgagor seeks to recover the statutory penalty after sending a letter to the lender/mortgagee that does not mention the statute and, in several respects, demands action by the lender/mortgagee that is not required by the statute.

Because this appeal involves the validity of a statute of the State of Missouri, this Court has exclusive appellate jurisdiction pursuant to Article V, Section 3 of the Constitution of Missouri.

STATEMENT OF FACTS

Respondents Kevin S. Brown and Melody L. Brown (hereinafter "the Browns") filed this case against appellant First Horizon Home Loan Corporation (hereinafter, "First Horizon") seeking a recovery under Mo. Rev. Stat. § 443.130 (2000). The statutes relevant to this case provide in pertinent part:

> **443.060. Acknowledgment of satisfaction and release, how made. --** 1. If any mortgagee . . . receive[s] full satisfaction of any security instrument, he shall, at the request and cost of the person making the same, deliver to such person a sufficient deed of release of the security instrument . . .
>
> **443.130. Forfeiture for failing to satisfy -- demand by certified mail required. --** 1. If any such person [mortgagee], thus receiving satisfaction, does not, within fifteen business days after request and tender of costs, deliver to the person making satisfaction a sufficient deed of release, such person shall forfeit to the party aggrieved ten percent upon the amount of the security instrument, absolutely, and any other damages such person may be able to prove such person has

> sustained, to be recovered in any court of competent jurisdiction. A business day is any day except Saturday, Sunday and legal holidays.
>
> 2. To qualify under this section, the mortgagor shall provide the request in the form of a demand letter to the mortgagee . . . by certified mail, return receipt requested. The letter shall include good and sufficient evidence that the debt secured by the deed of trust was satisfied with good funds, and the expense of filing and recording the release was advanced.
>
> 3. In any action against such person who fails to release the lien as provided in subsection 1 of this section, the plaintiff, or his attorney, shall prove at trial that the plaintiff notified the holder of the note by certified mail, return receipt requested.

(A2; A4).[1]

[1] Citations herein to "A" followed by a number are to pages in the Appendix to this Brief. Citations herein to "LF" followed by a number are to pages in the Legal File, which was filed with this Court on January 14, 2004.

On August 30, 2001, Browns executed a certain adjustable rate promissory note and promised to pay the sum of $60,000.00 to First Horizon. (LF 21 at ¶ 3, and 24-27). The repayment of this promissory note was secured by a deed of trust on the Browns' residence at 1115 Bliss Drive, St. Louis County, Missouri. (LF 22, at ¶ 4, 28-48). This was Browns' secondary, not primary residence. (LF 46).

On or about March 3, 2003, Browns paid off the balance of the promissory note. (A 8; Supplement to Legal File ("SLF") at p. 1). On March 4, 2003, Browns sent a letter via certified mail, return receipt requested, to the attention of First Horizon's post office box in Memphis, Tennessee, which stated:

> Demand is hereby made by Kevin S. and Melody L. Brown, that full and complete release be made for the land secured by Deed of Trust for the property located at 1115 Bliss, St. Louis, Mo., dated August 30, 2001 and recorded September 14, 2001. Property recorded in Book 13272 at page 700 of the St. Louis County land records.
>
> Certified funds, in the amount of $59,550.69 to pay the loan secured by the above referenced Deed of Trust in full, were disbursed on 03-03-03, Air Borne Express, tracking #17284193953.

> Also enclosed please find a check in the amount of $26.00 for tender of recording fees for the Deed of Release. I look forward to hearing from you.

(A 8-9). Browns' March 4, 2003 letter did not mention § 443.130 (2000). (Id.) [For unknown reasons, the March 4, 2003 letter was not attached to the petition contained in the legal file provided by the Clerk of Stoddard County. It was attached to the service copy of the petition, and is included in the appendix and supplemental legal file]).

On March 7, 2003, the letter was stamped as received by First Horizon payment center in Memphis, Tennessee. (A 9). This address is used for the receipt of regular monthly payments only. (LF 22). The address to be used for other communication with First Horizon, as set forth in the Deed of Trust, is 4000 Horizon Way, Irving, Texas 75063. (LF 29). The check enclosed with Browns' letter was made payable to Recorder of Deeds. (LF 56).

By letter dated March 11, 2003, First Horizon returned to Browns their check for $26.00, and requested that Browns reissue a check payable to First Horizon Home Loans. (LF 56). There is no evidence in the record that Browns ever reissued a check for the recording fees.

On March 21, 2003, a Deed of Release was prepared by First Horizon and transmitted to the St. Louis County recorder's office for recording. (LF 22). This

transmittal occurred on the tenth business day following First Horizon's receipt of the Browns' March 4, 2003 letter. The Deed of Release was recorded with the St. Louis County Recorder of Deeds on April 8, 2003. (LF 23).

On April 14, 2003, the Browns filed suit against First Horizon in Division III of the Circuit Court of Stoddard County seeking to recover the statutory penalty under § 443.130, *i.e.*, ten percent of the amount of their promissory note held by First Horizon, or $6,000.00. (LF 5-6). First Horizon filed an answer and affirmative defenses on May 22, 2003 (LF 7-10).

On June 30, 2003, First Horizon filed its motion to dismiss, or in the alternative, for summary judgment. (LF 11-48). On July 28, 2003, Browns filed a cross motion for summary judgment with the trial court. (LF 49-57). In their motion, the Browns did not claim that they suffered any damages as result of First Horizon's alleged violation of § 443.130. Instead, they sought a recovery of the statutory penalty. The parties agreed that the case should be submitted on the motions without hearing, and on October 6, 2003 the trial court entered its summary judgment in favor of Browns. (A 1; LF 58). Specifically, the trial court entered judgment in favor of the Browns in the amount of $6,000, plus statutory interest from and after the entry of the judgment. (A 1; LF 58).

On November 13, 2003, First Horizon timely filed a Notice of Appeal to this Court. (LF 59-66).

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN FAVOR OF THE BROWNS AND AGAINST FIRST HORIZON BECAUSE THE BROWNS' MARCH 4, 2003 LETTER DID NOT INVOKE MO. REV. STAT. SECTION 443.130, WHICH IS "HIGHLY PENAL" IN NATURE AND MUST BE STRICTLY CONSTRUED, IN THAT THE LETTER DID NOT MENTION THE STATUTE AND DEMANDED ACTION BY FIRST HORIZON NOT REQUIRED BY THE STATUTE.

Andes v. Albano, 853 S.W. 2d 936 (Mo. 1993) (en banc)

Lines v. Mercantile Bank, N.A., 70 S.W.3d 676 (Mo. App. S.D. 2002)

Snow v. Bass, 73 S.W. 630 (Mo. 1903)

Trovillion v. Chemical Bank, 916 S.W.2d 863 (Mo. App. E.D. 1996)

Mo. Rev. Stat. Section 443.060 (2000)

Mo. Rev. Stat. Section 443.130 (2000)

II. THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN FAVOR OF THE BROWNS AND AGAINST FIRST HORIZON BECAUSE, EVEN IF THE BROWNS' MARCH 4, 2003 LETTER INVOKED MO. REV. STAT. SECTION 443.130, THE BROWNS FAILED TO PROVE THAT FIRST HORIZON DID NOT COMPLY WITH THE STATUTE IN THAT NO EVIDENCE WAS PRESENTED BY THE BROWNS REFLECTING THAT FIRST HORIZON DID NOT TIMELY DELIVER A SUFFICIENT DEED OF RELEASE.

Mo. Rev. Stat. Section 443.130 (2000)

III. THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN FAVOR OF THE BROWNS AND AGAINST FIRST HORISON BECAUSE MO. REV. STAT. SECTION 443.130, AS APPLIED BY THE TRIAL COURT TO THE FACTS OF THIS CASE, VIOLATES ARTICLE I, SECTION 10 OF THE CONSTITUTION OF MISSOURI AND THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION IN THAT IT IS SO UNCLEAR THAT PERSONS OF COMMON INTELLIGENCE MUST NECESSARILY GUESS AT ITS MEANING.

Board of Education of the City of St. Louis v. State of Missouri,

47 S.W.3d 366 (Mo. 2001) (en banc)

State v. Young, 695 S.W.2d 882 (Mo. 1985) (en banc)

State ex rel. McNary v. Hais, 670 S.W.2d 494 (Mo. 1984) (en banc)

United States Constitution, Amendment XIV

Constitution of Missouri, Article I, Section 10

Mo. Rev. Stat. Section 443.130 (2000)

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN FAVOR OF THE BROWNS AND AGAINST FIRST HORIZON BECAUSE THE BROWNS' MARCH 4, 2003 LETTER DID NOT INVOKE MO. REV. STAT. SECTION 443.130, WHICH IS "HIGHLY PENAL" IN NATURE AND MUST BE STRICTLY CONSTRUED, IN THAT THE LETTER DID NOT MENTION THE STATUTE AND DEMANDED ACTION BY FIRST HORIZON NOT REQUIRED BY THE STATUTE.

A. Standard of Review.

On review of a summary judgment, the appellate court reviews the record in the light most favorable to the party against whom the judgment was entered, according the non-movant the benefit of all reasonable inferences from the record. Andes v. Albano, 853 S.W.2d 936, 940[4] (Mo. 1993) (en banc).

Review is de novo. "The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially.... The propriety of summary judgment is purely an issue of law. As the trial court's judgment is founded on the record submitted and the law, an appellate court need not defer to the trial court's order granting summary judgment...." ITT

Commercial Finance v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376[4-6] (Mo. banc 1993) (en banc) (citations omitted). Specifically, this Court must address the legal consequences of the facts contained in the record and if, under those facts, the Browns are not entitled to recover the penalty under § 443.130, the judgment of the trial court must be reversed. See Schroeder v. Horack, 592 S.W.2d 742, 744 (Mo. 1979) (en banc). In making this determination, this Court should accord no deference to the trial court's conclusion. Id. See also Howard v. Missouri State Board of Education, 913 S.W.2d 887, 888-89 (Mo. App. S.D. 1995).

B. The Browns Did Not Invoke Section 443.130.

The threshold issue posed in this case is whether the Browns' letter dated March 4, 2003 invoked the remedy provided by § 443.130. A determination of this issue requires an examination of both the Browns' letter and the statutory language. Such an examination reveals that the Browns' letter did not invoke the forfeiture remedy contained in § 443.130.

Section 443.130 is an enforcement mechanism for § 443.060. Ong Building Corp. v. GMAC Mortgage Corp. of Pa., 851 S.W.2d 54, 55 (Mo. App. W.D.1993). Specifically, the purpose of § 443.130 is to enforce the duty of the mortgagee to clear the title of the mortgagor, so that it is apparent upon examination that the

incumbrance of record no longer exists. Id.; Roberts v. Rider, 924 S.W.2d 555, 558 (Mo. App. S.D. 1996); Henry v. Orear, 78 S.W. 283, 284 (Mo. App. 1904).

Significantly, it has long been recognized that § 443.130 is "highly penal" because it requires a mortgagee to forfeit ten percent of the face amount of a promissory note. Trovillion v. Chemical Bank, 916 S.W.2d 863, 865 (Mo. App. E.D. 1996); Perrin v. Johnson, 124 S.W.2d 551, 555 (Mo. App. 1939). Consequently, this Court and the courts of appeal have repeatedly held that the statute must be "strictly construed." Id.; Snow v. Bass, 174 Mo. 149, 73 S.W. 630, 637 (Mo. 1903); Murray v. Fleet Mortgage Corp., 936 S.W.2d 212, 215 (Mo. App. E.D. 1996); Martin v. STM Mortgage Co., 903 S.W.2d 548, 550 (Mo. App. W.D. 1995).

The Browns' March 4, 2003 letter did not invoke the rights and obligations under § 443.130 for two reasons. First, the letter failed to put First Horizon on notice that a statutory demand under § 443.130 was being made. The letter does not mention the statute; sets forth no time for compliance; and does not request that the deed of release be delivered to the person making satisfaction. (A 8-9; LF54). Nor does the letter even generally track the statutory language. Where a letter from a borrower/mortgagor fails to make clear that a *statutory* demand is being made, there is no entitlement to relief under § 443.130. See Lines v. Mercantile Bank, N.A., 70 S.W.3d 676, 679-80 (Mo. App. S.D. 2002) (affirming summary

judgment in favor of bank where nothing in borrower's demand letter referenced § 443.130 and the letter did not request a deed of release within 15 business days, as the statute states). This is especially true where, as here, the borrower/mortgagor also demands that the lender/mortgagee take several actions that are not required by the statute.

Second, the Browns' letter demanded actions by First Horizon not required by § 443.130. The letter begins with a demand that "*full and complete release be made*" of the Deed of Trust on the Browns' property. (A 8; SLF 1). Browns did not demand that the deed of release be delivered to them or to a person making satisfaction. Under § 443.130, however, the lender/mortgagee is directed to "deliver to the person making satisfaction" a *sufficient* deed of release (emphasis added). The specific language chosen by Browns ("full and complete release") cannot be reconciled with the statute. Strict construction of the statute requires a finding that the letter was insufficient. Had the Browns followed the statute, they would have demanded that a sufficient deed of release be sent to them. This they did not do.

After receipt of a proper request, the statute allows the lender/mortgagee "fifteen business days" to deliver a sufficient deed of release to the person who paid the promissory note held by the lender/mortgagee. Here, First Horizon prepared and delivered to the recorder's office a sufficient deed of release on the

tenth business day following receipt of notice. Once it was sent to the recorder, it was out of First Horizon's control, and thus immaterial that the recorder did not place the deed of release of record until April 8, 2003. The Browns made no mention of the time in which performance was requested, stating only "I look forward to hearing from you.". This language fails to put First Horizon on the notice that states demand being made.

The third paragraph of the Browns' letter then states that "enclosed please find a check in the amount of $26.00 for tender of recording fees for the Deed of Release". This is the only mention in Browns' letter of a "Deed of Release". The letter suggests, but does not demand, that the "Deed of Release" be recorded; that does not request that the deed of release be delivered to the person making satisfaction.

When § 443.130 is strictly construed, as it must be, it does not purport to require the lender/mortgagee to record anything. Instead, the statute merely requires that the lender/mortgagee "deliver" a "sufficient deed of release" to the person who paid the promissory note secured by the deed of trust.[2]

[2] The term "a sufficient deed of release" is not defined in § 443.130 or any other statute contained in Chapter 443.

Prior to its amendment in 1994, § 443.130 allowed a lender/mortgagee to comply with the statute by either "acknowledg[ing] satisfaction on the margin of the record, or deliver[ing] to the person making satisfaction a sufficient deed of release."[3] The 1994 amendment deleted the recording method as a means of complying with the statute. This amendment harmonized § 443.130 with § 443.060, which had also been amended in 1991 to delete the provision allowing a lender/mortgagee to release a deed of trust by "acknowledg[ing] satisfaction of the security instrument on the margin of the record thereof."

As such, if a borrower now requires the recordation of a deed of release, as Browns imply in the instant case, the provisions of § 443.130 are not triggered because the borrower has demanded action not required by the statute.

First Horizon was only obligated to timely deliver a sufficient deed of release to "the person making satisfaction" of the security instrument. Browns made no demand that the deed of release be sent to them.

The court "should regard the laws as meaning what they say; the [legislature] is presumed to have intended exactly what it states directly and unambiguously." State ex rel. Bunker Resource, Recycling and Reclamation, Inc.

[3] A copy of § 443.130 prior to its 1994 amendment can be found in the Appendix to this Brief. (A 5).

v. Dierker, 955 S.W.2d 931, 933 (Mo. 1997) (en banc) (quoting In re Estate of Thomas, 743 S.W.2d 74, 76 (Mo. 1988) (en banc)).

The record in this case reflects that First Horizon discharged its duty under § 443.060 by promptly recording a release of its deed of trust on the Browns' property. In fact, the record is undisputed that First Horizon prepared and delivered to St. Louis County a Deed of Release within ten business days after receiving the Browns' letter. (LF 22). The purpose of § 443.130 was therefore served, even though Browns failed to invoke the statute with their letter.

First Horizon did exactly as Browns requested in the letter. Upon receipt of Browns' letter, First Horizon prepared and executed a Deed of Release. It then sent the Deed of Release to the St. Louis County Recorder of Deeds for recording, which delivery was accomplished in just ten business days following First Horizons' receipt of the letter.

In addition, by letter dated March 11, 2003, First Horizon notified Browns that the tender for costs was ineffective, because the check had been made payable to "Recorder of Deeds" rather than First Horizon. (LF 56). First Horizon could not negotiate a check payable to another. There is no evidence that Browns reissued the check. That being the case, there was not strict compliance with the statute's requirement that there be "good and sufficient evidence … the expense of filing and recording the release was advanced." § 443.130.2.

The instant case is similar to Martin v. STM Mortgage Co., 903 S.W.2d 548 (Mo. App. W.D. 1995), which was "tried to the [trial] court on stipulated facts." 903 S.W.2d at 550. The trial court awarded plaintiffs the statutory penalty under § 443.130 and the lender appealed. The court of appeals reversed on grounds the plaintiffs failed to plead or prove the date on which they satisfied their debt to the lender. Id. at 551. Without proof of the payment date, [like sufficient evidence that Browns advanced the recording fees] the court concluded that it was impossible to determine whether the lender exceeded the time permitted for delivering a sufficient deed of release to the plaintiffs. Id. The court reached this conclusion even though "[i]n all likelihood, given the strict deadlines for the banking industry contained in the Uniform Commercial Code, the check was paid within days of its deposit and STM Mortgage violated the statute." Id. See also Wing v. Union Central Life Insurance Company, 137 S.W. 11 (Mo. App. 1911) ("The statute is highly penal, must be strictly construed and the plaintiff invoking it must plead and prove all of the elemental facts . . . Nothing must be left to inference.").

While the Browns wasted little time in filing suit against First Horizon for allegedly failing to comply with § 443.130, they never asked First Horizon to take the actions required by the statute. Instead, they asked for something quite different, and First Horizon complied with their request. The statutory penalty

should not be imposed on First Horizon where, as here, it complied with the Browns' request to take actions to clear title which are materially different than those required by § 443.130. To hold otherwise would violate the principle that § 443.130 must be strictly construed and result in an unwarranted expansion of a highly penal statute.

In Martin, the lender/mortgagee (STM) argued that plaintiffs (the Martins) were not entitled to the statutory penalty because their demand letter did not constitute a "request" as contemplated by § 443.060 and §443.130. Specifically, STM claimed that the Martins' letter "contained nothing more than a recitation of § 443.130." Id. at 550. The court of appeals rejected this argument, citing the following general proposition:

> A demand or request to the mortgagee to enter satisfaction of the mortgage is a condition precedent to the right to sue for the statutory penalty. No particular form of words is necessary for this demand; it is sufficient if it informs the mortgagee with reasonable certainty that an entry of satisfaction of the particular mortgage is requested.

Id. (quoting 59 C.J.S. Mortgages § 474c (1949)).[4]

Unlike the plaintiffs in Martin, Browns did not recite § 443.130 in their letter, and in fact, Browns' letter does not even mention § 443.130. The Browns' letter expressly demands that First Horizon take actions different from those required by § 443.130. While a proper "request" under § 443.130 may require "[n]o particular form of words," the borrower must say enough in the request to fairly put the lender/mortgagee on notice that a demand is being made pursuant to § 443.130. Like the plaintiffs in Martin, Browns could have done so by simply reciting the statute in their letter.

In any event, the term "request" would have to be read expansively in order for the Browns to recover the statutory penalty in this case. Of course, this is not permissible since § 443.130 is highly penal in nature. See Snow, 73 S.W. at 637. When correctly (strictly) construed, the substance of a proper "request" under § 443.130 entails a demand by the borrower/mortgagor that the lender/mortgagee

[4] The Martin case was decided before the 1994 amendment to § 443.130. Thus, STM had the option of complying with the statute by "acknowledg[ing] satisfaction of the security instrument on the margin of the record thereof, or deliver[ing] to [the person making satisfaction] a sufficient deed of release of the security instrument . . ..".

deliver a sufficient deed of release to the person making satisfaction within 15 business days of receiving the demand letter. The Browns made no such "request" in this case. Rather, they demanded that "a full and complete release be made", which First Horizon did. In addition, the Browns made no demand that evidence of the release be delivered to them. None of these actions are consistent with § 443.130.

It is not unfair to require borrowers a make an appropriate "request" under the statute since they stand to gain a substantial windfall should lenders fail to properly and timely respond. Further, an appropriate "request" is essential in view of the manner in which in lending industry has changed. As stated by the court in Trovillion v. Countrywide Funding Corp., 910 S.W.2d 822 (Mo. App. E.D. 1995):

> In the early 1900's, and for many years thereafter, banks and other lenders retained the borrower's note in their own portfolio. Thus, during the term of the note, the borrower would deal directly with a local lender and could talk face to face with the lender or its employees.
>
> In recent years, that practice has changed. Now, lenders loan money and take deeds of trust never intending to retain those notes in their own portfolio. Rather, they generate fees from making the loan and then promptly

> sell the loan to another. *Often, the ultimate holder of a note and deed of trust is located a great distance from where the loan originated. Rather than talking in person with a lender's employee, borrowers communicate through the mails with unseen employees.*

Id. at 823-24 (footnote omitted) (emphasis added).

As this case demonstrates, an appropriate "request" by a borrower/mortgagor is also necessary to avoid turning § 443.130 into a trap for lenders. Browns chose to send their request to a post office box used for payments, not the address for correspondence dictated by the Deed of Trust, a method designed to attract the least attention. Browns were not damaged by any action of First Horizon, nor did they attempt to allege or prove damages. First Horizon did everything that was requested of it by the letter and, in the process, prepared a deed of release and forwarded it to the recorder within ten, not fifteen, days. By assessing the statutory penalty against First Horizon, the lower court in effect found that First Horizon should have understood the letter to be a demand under § 443.130 (which is *not* what it purported to be); and then should have complied with the statute rather than doing as the Browns requested. If allowed to stand, the result in this case will encourage borrowers to make demands that are neither clear nor forthright, in hopes of lulling lenders into not complying with the statute.

II. THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN FAVOR OF THE BROWNS AND AGAINST FIRST HORIZON BECAUSE, EVEN IF THE BROWNS' MARCH 4, 2003 LETTER INVOKED MO. REV. STAT. SECTION 443.130, THE BROWNS FAILED TO PROVE THAT FIRST HORIZON DID NOT COMPLY WITH THE STATUTE IN THAT NO EVIDENCE WAS PRESENTED BY THE BROWNS REFLECTING THAT FIRST HORIZON DID NOT TIMELY DELIVER A SUFFICIENT DEED OF RELEASE.

The standard of review for this claim of error is the same as for Point I, supra.

Even if the Court finds that Browns' letter was sufficient to invoke the statute, § 443.130 requires the lender to deliver a sufficient deed of release. [as discussed above, since Browns did not request that a deed of release be delivered to them, the inquiry at this point focuses on what is sufficient "delivery"]. It is significant that the statute does not require a lender to record a deed of release within fifteen days. The undisputed evidence is that First Horizon delivered the deed of release to the St. Louis County Recorder on March 21, 2003.

The Browns failed to present evidence on key points they were required to prove in order to recover the statutory penalty, *to-wit*, that First Horizon did not timely deliver a sufficient deed of release; and that they tendered the cost of

recording. In view of this failure of proof, the judgment in this case should be reversed.

III. THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN FAVOR OF THE BROWNS AND AGAINST FIRST HORISON BECAUSE MO. REV. STAT. SECTION 443.130, AS APPLIED BY THE TRIAL COURT TO THE FACTS OF THIS CASE, VIOLATES ARTICLE I, SECTION 10 OF THE CONSTITUTION OF MISSOURI AND THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION IN THAT IT IS SO UNCLEAR THAT PERSONS OF COMMON INTELLIGENCE MUST NECESSARILY GUESS AT ITS MEANING.

The standard of review for this claim of error is the same as for Point I, supra.

First Horizon's final appeal point concerns the constitutionality of § 443.130, and that the statute, as applied to the facts of this case, is unconstitutionally vague. However, the Court need not address this point if it determines there is reversible error as to other issues raised by First Horizon. See Rodriguez v. Suzuki Motor Corp., 996 S.W.2d 47, 53 (Mo. 1999) (en banc).

The "void-for-vagueness" doctrine stems from the Due Process Clauses of the Fourteenth Amendment of the United States Constitution and Article I, Section

10 of the Missouri Constitution. "These clauses require that statutes whose enforcement may result in a deprivation of liberty or property be worded with precision sufficient to enable reasonable people to know what conduct is proscribed so they may conduct themselves accordingly." Fitzgerald v. City of Maryland Heights, 796 S.W.2d 52, 55 (Mo. App. E.D. 1990) (citing Grayned v. City of Rockford, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222, 227-228 (1972) and State ex rel. Cook v. Saynes, 713 S.W.2d 258, 260 (Mo. 1986) (en banc).

In State v. Young, 695 S.W.2d 882 (Mo. 1985) (en banc), this Court stated:

> Vagueness, as a due process violation, takes two forms. One is the lack of notice given a potential offender because the statute is so unclear that men of common intelligence must necessarily guess at its meaning. The second is that the vagueness doctrine assures that guidance, through explicit standards, will be afforded to those who must apply the statute, avoiding possible arbitrary and discriminatory application.

Id. at 884 (internal quotations and citations omitted).

More recently, in Board of Education of the City of St. Louis v. State of Missouri, 47 S.W.3d 366 (Mo. 2001) (en banc), this Court held:

> The standard for determining whether a statute is void for vagueness is whether the terms or words used are of common usage and are understandable by persons of ordinary intelligence. Where, however, the statutory terms are of such uncertain meaning, or so confused that the courts cannot discern with reasonable certainty what is intended, the statute is void.

Id. at 369 (internal quotations and footnoted citations omitted).

The "void-for-vagueness" doctrine is applicable to civil as well as criminal cases. State ex rel. Missouri State Board of Registration for the Healing Arts v. Southworth, 704 S.W.2d 219, 223 (Mo. 1986) (en banc) (citing Boutilier v. Immigration & Naturalization Service, 387 U.S. 118, 123, 87 S.Ct. 1563, 1566, 18 L.Ed.2d 661 (1967)); Ferguson Police Officers Association v. City of Ferguson, 670 S.W.2d 921, 927 (Mo. App. E.D. 1984). Finally, in reviewing vagueness challenges, "it is not necessary to determine if a situation could be imagined in which the language used might be vague or confusing; the language is to be treated by applying it to the facts at hand." Young, 695 S.W.2d at 883-84.

The language of § 443.130 is unclear and confusing when applied to the facts of the instant case. The problem with the statute stems in large part from its recent amendments. Prior to 1994, § 443.130 allowed a lender two means of

satisfying the statute at the lender's election. Specifically, it could either (a) file the deed of release on the margin of record with the recorder of deeds, or (b) deliver the deed of release to the borrower. In 1994, however, the legislature amended § 443.130 and deleted the language allowing a lender to file the deed of release with the recorder of deeds as a means of compliance. (A 6).

As a consequence of the 1994 amendment, the most a borrower/mortgagor can demand of a lender/mortgagee is to timely "deliver to the person making satisfaction a sufficient deed of release." In other words, after 1994, a borrower/mortgagor no longer has a basis under the terms of the statute to demand that a lender/mortgagee *record* a release of a deed of trust. See State ex rel. Director of Revenue v. Gaertner, 32 S.W.3d 564, 567 (Mo. 2000) (en banc) ("When the legislature has altered an existing statute such change is deemed to have an intended effect, and the legislature will not be charged with having done a meaningless act."). Indeed, because § 443.130 no longer involves the actual recording of a release, the time for lenders/mortgagees to comply with the statute was *shortened* from 30 days to 15 business days when it was again amended in 1996.[5]

[5] The 1996 amendments to § 443.130 are set forth on page A 7 of the Appendix to this Brief.

Confusingly, however, the 1996 amendment added a provision requiring that a proper statutory demand by a mortgagor "shall include . . . the expense of filing and recording the release . . .." See § 443.130.2. (A 7). This provision is contradictory to the 1994 amendment which, as previously noted, *eliminated* any recording requirement. Consequently, persons of common intelligence can only guess at what § 443.130 now means.[6] This Court has invalidated other statutes on vagueness grounds when faced with such internal contradictions. See, e.g., Board of Education of the City of St. Louis, 47 S.W.3d at 370-71.

In the present case, the trial court imposed the statutory penalty against First Horizon even though the Browns demanded a "full and complete release" of the Deed of Trust on the Browns' property, which could only be accomplished by recording a deed of release. (A 8-9). Further, the Browns also stated that they were enclosing funds "*for tender of recording fees*" for the Deed of Release. (Id.) (emphasis added). While First Horizon promptly complied with the Browns'

[6] Perhaps the undefined term "a sufficient deed of release" means a copy of a recorded deed of release, which would explanation the statutory language regarding the "expense of filing and recording." Of course, the problem with such an interpretation is manifest -- there is nothing in § 443.130 which indicates that recording is required.

demand, it was not a demand that invoked § 443.130. Since its amendment in 1994, the statute has had nothing to do with recording -- the very act contemplated here by the Browns.

By its terms, § 443.130 purports to impose a penalty on a lender/mortgagee if, after receiving full payment and a proper request from the mortgagor, a lender/mortgagee does not timely "deliver to the person making satisfaction a sufficient deed of release." First Horizon does not understand § 443.130 to extend liability to those instances where, as here, the mortgagor's request clearly demands action by the lender/mortgagee that is *different* from that required by the statute. Certainly, not every demand made by a mortgagor will invoke § 443.130. The statute, after all, requires that only certain, specified actions need be taken by the lender/mortgagee (*i.e.*, timely deliver to the person making satisfaction a sufficient deed of release). To somehow construe the statute to impose liability when a mortgagor has requested something different unfairly deprives potential offenders of their property without sufficient notice. Nevertheless, this is what the trial court did in this case.

As previously noted, the purpose of § 443.130 is to enforce the duty of a lender/mortgagee to clear the title of the borrower/mortgagor, so that it is apparent upon examination that the incumbrance of record no longer exists. Roberts, 924 S.W.2d at 558; Ong Building Corp., 851 S.W.2d at 55; Henry, 78 S.W. at 284.

In the present case, it is undisputed that, within ten business days of receiving the Browns' letter, First Horizon fulfilled its duty to clear the title on the Browns' property by preparing and forwarding to the recorder a deed of release. (LF 22-23). At that point, the purpose of the statute was clearly satisfied. Requiring more of First Horizon at that point would be senseless because there was nothing more that First Horizon could do. First Horizon cannot be held responsible for delays at the recorder's office in placing the release of record.

The statute would appear to be rendered inapplicable where, as here, a mortgagee immediately prepares and forwards for recording a deed of release and thereby accomplishes what § 443.130 is designed to achieve (the clearing of title). See Budding v. SSM Healthcare System, 19 S.W.3d 678, 681 (Mo. 2001) (en banc) ("in construing the statute, the Court is not to assume the legislature intended an absurd result."); State ex rel. McNary v. Hais, 670 S.W.2d 494, 495 (Mo. 1984) (en banc) ("we presume that the legislature did not intend to enact an absurd law ... and we favor a construction that avoids unjust or unreasonable results."); State ex rel. Safety Ambulance Service, Inc. v. Kinder, 557 S.W.2d 242, 247 (Mo. 1977) (en banc) ("in construing the Act . . . we seek to promote the purposes and objects of the statute and to avoid any strained and absurd meaning.").

As the facts of this case demonstrate, the terms of § 443.130 are of such uncertain meaning that persons of common intelligence must necessarily guess at its meaning. The Court should therefore find it void.

CONCLUSION

For the reasons discussed herein, the judgment of the trial court in favor of the Browns and against First Horizon should be reversed, and judgment entered in favor of First Horizon.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing Brief and a disk in compliance with Rule 84.06(g) were mailed, first class, postage prepaid, to the person listed below this ____ day of March, 2004.

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CERTIFICATE OF COMPLIANCE WITH RULES 84.06(c) AND (g)

The undersigned hereby certifies that the foregoing Brief complies with the limitations set forth in Rule 84.06(b) and that the number of words in the Brief are 7,020. The undersigned relied on the word count feature of his firm's word-processing system to arrive at that number.

The undersigned further certifies that the labeled disk, filed concurrently herewith, has been scanned for viruses and is virus-free.

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Attorney for Appellant

APPENDIX

INDEX TO APPENDIX